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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ANTONIO J. BARRAGAN,  
12 CDCR #BA-2038,

13 Plaintiff,

14 vs.  
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16 CAPTAIN D. FLYNN, et al.,

17 Defendants.  
18  
19

Case No.: 3:16-cv-1391-MMA-JMA

**ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

[Doc. No. 25]

20 Plaintiff Antonio J. Barragan, previously detained at San Diego County Jail and  
21 proceeding *pro se*, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983,  
22 alleging Defendant San Diego Sheriff's Department Captain D. Flynn<sup>1</sup> denied him proper  
23 medical attention by "ignoring" his pain and need for shoulder surgery in violation of the  
24 Eighth and Fourteenth Amendments. *See* Doc. No. 1. Defendant Flynn moves for  
25 summary judgment as to Plaintiff's claim. *See* Doc. No. 25. To date, Plaintiff has not  
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28 <sup>1</sup> Plaintiff also names an "unidentified medical officer" in his complaint. This doe defendant has not  
been named or served.

1 filed a response to Defendant’s motion. The Court took the motion under submission on  
2 the moving papers and without oral argument pursuant to Civil Local Rule 7.1.d.1. For  
3 the reasons set forth below, the Court **GRANTS** Defendant’s motion.

#### 4 **BACKGROUND**<sup>2</sup>

5 Plaintiff claims that on April 26, 2015, he was involved in a physical altercation  
6 with a fellow inmate at San Diego County Jail. *See* Doc. No. 1-2 at 6.<sup>3</sup> Plaintiff suffered  
7 injuries during the altercation. *Id.* Plaintiff testified that he was taken to the jail medical  
8 unit after the altercation, where he was treated for cuts and abrasions, and examined for a  
9 possible concussion. *See* Doc. No. 25-3 at 2. Several days later, Plaintiff requested  
10 medical attention due to pain in his shoulders. *See* Doc. No. 25-4 at 11-12. Plaintiff was  
11 offered pain medication, but at various times he declined to take the recommended  
12 medication. *Id.* at 27. Plaintiff saw a doctor, who placed Plaintiff on the “ortho list”  
13 based on a suspected torn rotator cuff. *Id.* at 16. Plaintiff received cortisone injections  
14 and physical therapy several times. *Id.* Six or seven months later, Plaintiff saw a surgeon  
15 who ordered an MRI scan of Plaintiff’s shoulder. *Id.* at 20. Plaintiff ultimately advised  
16 the surgeon that a previously administered steroid injection was not sufficient for the  
17 pain, and surgery was necessary. *Id.* Plaintiff’s surgery was scheduled, however,  
18 Plaintiff was transferred to another institution and he never received the surgery. *Id.*  
19 During his time at San Diego County Jail, Plaintiff’s only contact with Defendant Flynn  
20 was when he asked Flynn a question about something unrelated to his injuries. *Id.* at 10.

#### 21 **LEGAL STANDARD**

22 “A party may move for summary judgment, identifying each claim or defense – or  
23 the part of each claim or defense – on which summary judgment is sought. The court  
24 shall grant summary judgment if the movant shows that there is no genuine dispute as to  
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27 <sup>2</sup> These facts are taken primarily from Plaintiff’s deposition testimony, which the Court cross-referenced  
with the exhibits attached to Plaintiff’s unverified complaint.

28 <sup>3</sup> Citations refer to the pagination assigned by the CM/ECF system.

1 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.  
2 P. 56(a). A fact is material if it could affect the outcome of the suit under applicable law.  
3 *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A dispute about a  
4 material fact is genuine if there is sufficient evidence for a reasonable jury to return a  
5 verdict for the non-moving party. *Id.* at 248.

6 The party seeking summary judgment bears the initial burden of establishing the  
7 basis of its motion and of identifying the portions of the declarations, pleadings, and  
8 discovery that demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*  
9 *v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party does not bear the burden of  
10 proof at trial, he may discharge his burden of showing no genuine issue of material fact  
11 remains by demonstrating that “there is an absence of evidence to support the nonmoving  
12 party’s case.” *Id.* at 325. The burden then shifts to the opposing party to provide  
13 admissible evidence beyond the pleadings to show that summary judgment is not  
14 appropriate. *Id.* at 324. The party opposing summary judgment cannot “rest upon the  
15 mere allegations or denials of [its] pleading but must instead produce evidence that sets  
16 forth specific facts showing that there is a genuine issue for trial.” *Estate of Tucker v.*  
17 *Interscope Records*, 515 F.3d 1019, 1030 (9th Cir.), cert. denied, 555 U.S. 827 (2008)  
18 (internal quotation marks omitted).

19 In applying the standard set forth under Rule 56, district courts must “construe  
20 liberally motion papers and pleadings filed by *pro se* inmates and . . . avoid applying  
21 summary judgment rules strictly.” *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir.  
22 2010). A court must consider as evidence in opposition to summary judgment all  
23 contentions “offered in motions and pleadings, where such contentions are based on  
24 personal knowledge and set forth facts that would be admissible in evidence, and where  
25 [the party appearing *pro se*] attested under penalty of perjury that the contents of the  
26 motions or pleadings are true and correct.” *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir.  
27 2004). However, neither an unverified complaint nor unsworn statements made in the  
28 parties’ briefs can be considered as evidence at this stage. *Moran v. Selig*, 447 F.3d 748,

1 759 & n. 16 (9th Cir. 2006) (unverified complaint cannot be considered as evidence on  
2 motion for summary judgment).

### 3 DISCUSSION

4 Defendant Flynn moves for summary judgment based on the lack of any evidence  
5 to demonstrate that he personally participated in the allegedly unlawful acts at issue in  
6 this case. As such, Defendant argues that no reasonable trier of fact could find that he  
7 was deliberately indifferent to Plaintiff's medical needs in violation of Plaintiff's  
8 constitutional rights.

9 To succeed on a claim for deficient medical care, a plaintiff must show "deliberate  
10 indifference" to his or her "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104  
11 (1976) (setting forth legal standard under the Eighth Amendment).<sup>4</sup> This includes "both  
12 an objective standard – that the deprivation was serious enough to constitute cruel and  
13 unusual punishment – and a subjective standard – deliberate indifference." *Snow v.*  
14 *McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (*overruled in part on other grounds by*  
15 *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014)).

16 Deliberate indifference "may appear when prison officials deny, delay or  
17 intentionally interfere with medical treatment, or it may be shown by the way in which  
18 prison physicians provide medical care." *Hutchinson v. United States*, 838 F.2d 390, 394  
19 (9th Cir. 1988). A prison official is deliberately indifferent whenever the official "knows  
20 of and disregards an excessive risk to inmate health and safety." *Toguchi v. Chung*, 391  
21 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Gibson v. Cnty. of Washoe*, 290 F.3d 1175,  
22 1187 (9th Cir. 2002)) (internal quotation marks omitted). This requires more than mere  
23 misdiagnosis, medical malpractice, or even gross negligence. *Wood v. Housewright*, 900  
24 F.2d 1332, 1334 (9th Cir. 1990).

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27 <sup>4</sup> Because Plaintiff was a pretrial detainee at the time in question, Plaintiff's claim against Defendant  
28 Flynn arises under the Fourteenth Amendment Due Process clause. See *Clouthier v. Cnty. of Contra*  
*Costa*, 591 F.3d 1232, 1242-44 (9th Cir. 2010). However, the Eighth Amendment deliberate  
indifference standard applies. *Id.* at 1244.

1 a) Serious Medical Need

2 Plaintiff testified during his deposition that he suffered some serious injury to at  
3 least one of his shoulders while incarcerated at San Diego County Jail. Defendant Flynn  
4 offers no evidence to the contrary. Accordingly, the Court finds that Plaintiff had a  
5 serious medical need.

6 b) Deliberate Indifference

7 Plaintiff claims generally that he received deficient medical care for his shoulder  
8 during his period of incarceration at San Diego County Jail. Plaintiff's sole specific  
9 allegation against Defendant Flynn is that he "ignored" the surgeon's recommendation  
10 that Plaintiff needed surgery to repair Plaintiff's shoulder injury. Doc. No. 1-2 at 1.

11 Plaintiff's own deposition testimony contradicts this allegation. First, Plaintiff  
12 testified that his only contact with Defendant Flynn was when he asked Flynn a question  
13 about something unrelated to his injuries. *See* Doc. No. 25-4 at 10. There is no evidence  
14 in the record to suggest that Defendant knew of Plaintiff's medical condition, or was  
15 personally involved with Plaintiff's medical treatment. Moreover, absent any personal  
16 participation, Defendant Flynn may not be held liable for the actions of subordinate  
17 correctional or medical personnel. *See Maxwell v. Cty. of San Diego*, 708 F.3d 1075,  
18 1086 (9th Cir. 2013) (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)) ("A  
19 supervisor is liable under § 1983 for a subordinate's constitutional violations 'if the  
20 supervisor participated in or directed the violations, or knew of the violations and failed  
21 to act to prevent them.'").

22 Second, Plaintiff testified that after he informed the surgeon that surgery was  
23 necessary, the surgery was in fact scheduled. *See* Doc. No. 25-4 at 16. Plaintiff did not  
24 undergo surgery because he was transferred to another institution. *Id.* There is no  
25 evidence in the record to suggest that any correctional or medical personnel at San Diego  
26 County Jail "ignored" Plaintiff's need for surgery, much less that Defendant Flynn had  
27 any personal involvement in these events. To the contrary, Plaintiff testified that he  
28 received ongoing medical treatment while housed at the jail. Any disagreement with the

1 prescribed treatment and medication is insufficient to establish deliberate indifference.  
2 *See Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981) (holding “[a] difference of  
3 opinion between a prisoner-patient and prison medical authorities regarding treatment  
4 does not give rise to a § 1983 claim”).

5 Finally, Plaintiff claims that the medical treatment for his shoulders was  
6 unreasonably delayed. A delay in providing medical care may manifest deliberate  
7 indifference. *Estelle*, 429 U.S. at 104-05. Here, a period of months passed before a  
8 surgeon examined Plaintiff, an MRI was performed, and surgery was scheduled.  
9 However, there are no facts in the record to suggest that Defendant Flynn had any  
10 involvement in the timing or scheduling of Plaintiff’s medical appointments. The initial  
11 misdiagnosis of a torn rotator cuff likely contributed to the delay. But even if grossly  
12 negligent, the misdiagnosis is insufficient to establish deliberate indifference, particularly  
13 against Defendant Flynn, who appears to have played no role in Plaintiff’s medical care.  
14 *Id.* at 106.

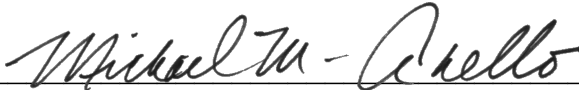
15 In sum, Defendant Flynn has met his burden of showing a complete “absence of  
16 evidence to support” Plaintiff’s claim against him. *Celotex Corp.*, 477 U.S. at 325. As  
17 such, no reasonable trier of fact could find Defendant liable for Plaintiff’s injuries, and  
18 judgment in Defendant’s favor is appropriate.

19 **CONCLUSION**

20 Based on the foregoing, the Court **GRANTS** Defendant’s motion for summary  
21 judgment as to Plaintiff’s claims in this action. The Clerk of Court is instructed to enter  
22 judgment in favor of Defendant, and close the case.

23 **IT IS SO ORDERED.**

24 DATE: November 3, 2017

25   
26 HON. MICHAEL M. ANELLO  
27 United States District Judge  
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